Supreme Court, U.S.
FILED

No. 011676 MAY 14 2002

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IN THE

Supreme Court of the United States

ROEBLING LIQUORS, INC., AND
SIDNEY COOPER AS OFFICER,
Petitioners,

v.

COMMISSIONER OF TAXATION AND FINANCE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals of New York

PETITION FOR A WRIT OF CERTIORARI

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54 pg

QUESTIONS PRESENTED

Uncontested Facts: Preparatory to understanding the questions.

In order to improve the State's flagging tax collection efforts, the Tax Commissioner engaged in a coercive, massive, computerized "Fishing Expedition" into the records of 20,000 businesses, in the pursuit of clues to potential wrongdoing, absent probable cause, a subpoena, or any form of compulsion by legal process, to include any of the constraints normally associated with a lawful search. These facts are uncontested.

The prior Courts, by accepting the Respondent's argument that petitioners lacked standing to contest the third party searches, ignored this Court's strong contrary holding, as expressed in *U.S. v. Miller*, 425 U.S. 435, 444-446 (1976); notes 6 [2nd Par] and 7. Said notes conferred standing when the tax authorities engaged in a massive fishing expedition, absent court approval.

In the course thereof, the Tax Commissioner violated every single commandment contained in the U.S. Constitution's 4th Amendment, and much of the 5th Amendment, to include comparable articles of New York State's Constitution..

The questions arising therefrom, are as follows:

1. Was the overlybroad 3rd party search into the records of 20,000 regulated businesses unlawful at its inception, when it lacked court approval in the form of a subpoena duces tecum, as required under *U.S. v. Miller*, Notes 6 and 7? (See pages 3-7)

2 Were the petitioners unlawfully deprived of standing under the above cited circumstances? (see pages 3 – 7)

3 May the tax commissioner employ free wheeling practices, which in their totality are "unencumbered by

traditional bureaucratic restraints" - and which have as their stated objective - knowledge of "everything there is to know about every taxpayer"? (see: page 6)

4 Does the letter, spirit, and intent of constitutional law permit massive, coercive searches, absent judicial sanction, into third party records upon mere suspicion of wrongdoing? (see pages: 13-20)

5 Was it judicious for the New York State's Court of Appeals, to render an opinion contrary to this Court's holding in *U.S. v. Miller*, notes 6 (2nd par) and 7 [which would have granted Petitioners' standing under the instant circumstances], without providing an explanation?

6 Did the lower Courts decide correctly, when ruling that regulated businesses were not subject to the protections of the 4th Amendment, despite the strong contrary holdings of this Court under *Camera v. Municipal Court* and *See v. City of Seattle* and New York's Court of Appeals under *Matter of Finns liquor shop v. State Liquor Authority* and *People v. Keta*? (see: pages 16, 17, 18 and 19).

7 Did the threats, intimidation and coercive tactics employed by the Tax Commissioner against third parties, absent their freely given consent, or compulsion by legal process, render the product thereof inadmissible? (see pages 6, 7, 11 and 12)

8 The system of checks and balances are central to our form of government, yet no consideration was given to this essential requirement. Accordingly, can this Court likewise permit the omission of this important constitutional safeguard in its deliberations, in view of the uncontested facts?

9 Was due process violated, since no judicial sanction was sought for the massive third party search – and

since, the taxpayers were never informed, thereby denying them the opportunity of contesting the legality of the search, as the *New York State's Automotive Wholesalers Association* and its customers, successfully accomplished under similar circumstances? (see: page 9 and Appendix D, pages A9-10)

List of Parties to These Proceedings

PETITIONER: Roebling Liquors, Inc., and Sidney Cooper, as Officer.

RESPONDENTS: New York State, Commissioner of Taxation and Finance, With Legal Service Upon:

Andrew D. Bing, Assistant Solicitor General
New York State Office of Attorney General
The Capitol
Albany, N.Y. 12224

Corporate Disclosure Statement

Please be advised that there is no parent or publically held company which owns 10 per cent or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Roebling Liquors, Inc., and Sidney Cooper as officer, hereby petition for a writ of certiorari to review the judgment of the Court of Appeals of New York in this case.

OPINIONS BELOW

The October 18, 2001, opinion of the Court of Appeals of New York, concluding: "*no substantial constitutional question directly involved*" is reported at 2001 N.Y. LEXIS 3280, and is reprinted in Appendix B hereto at page A2. The subsequent December 20, 2001, decision of the Court of Appeals of New York denying Motion for Reconsideration, is reported at 2001 N.Y. LEXIS 3836, and is reprinted in Appendix A hereto at page A1. The June 14, 2001, opinion of the Supreme Court of New York, Appellate Division, Third Department, is reported at 728 N.Y.S.2d 509 and 2001 N.Y. App. Div. LEXIS 6236, and is reprinted in Appendix C hereto at pages A3 through A8. The November 24, 1999, opinion of the New York Tax Appeals Tribunal is reported at 1999 WL 1098981 and RIA SLT NY 814192.

JURISDICTION

Timeliness: An extension was granted to May 19, 2002 by Associate Justice Ruth Bader Ginsburg. (See: Appendix E, pages A11-A12)

The date upon which the New York State Court of Appeals, the State's highest Court decided the matter pursuant to a timely rehearing was 12/20/01, entered on 12/26/01. (See: Appendix A, page A-1)

The date at which the New York State Court of Appeals initially decided this matter was on October 18, 2001. (See: Appendix B, page A-2)

Jurisdiction of this Court is invoked under 28 U.S.C. sections 1257 (a) and 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment of the Bill of Rights of the United States Constitution (Article I, section 12 of the New York State Constitution) provides for:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." (emphasis added)

Fifth Amendment of the Bill of Rights of the United States Constitution (Article I, Section 6, of the New York State Constitution) provides that:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment of an indictment of a Grand Jury, except in cases arising in this land or naval forces, or in the militia, when in actual service in time of War or other public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property, WITHOUT DUE PROCESS OF LAW; nor shall private property be taken for public use without just compensation. *{emphasis added}*

STATEMENT OF THE CASE

A Systemic Bureaucratic Misconduct

The primary constitutional question arising herein, is whether the tax commissioner may violate with impunity, every single commandment contained in both the Federal and State Constitutions, concerning search and seizure?

Alternatively, whether the New York Courts may totally ignore stare decisis involving hundreds of celebrated constitutional cases including the controlling case in third party searches and seizures: *U.S. v. Miller*, 425 U.S. 435, 444-446 (1976); notes 6 [2nd Par] and 7 - which is dispositive on the issue of standing in this matter ?

B. *Miller*, The Seminal Case re: 3rd Party Searches

Inexplicably, because the lower Courts blindly accepted the Respondents contention that the Petitioners lacked standing - our assertions to the contrary, were arbitrarily ignored, never addressed, despite the facts and case law (particularly *Miller*) which gave rise to our constitutional challenge.

Particularly troubling, was the Respondents reference to the *Miller* case, as supporting ***its*** understanding regarding petitioners "lack of standing." That misconception was swallowed whole by the lower courts without examination. However, nothing could be further from the truth or the facts thereof, as the *Miller* case demonstrates. While it is true that *Miller* had no expectation of privacy in his bank records - it is only true under *Miller's* note 6, ***if*** the IRS had obtained said bank records pursuant to a court ordered subpoena - and ***if*** the search was limited. Two conditions precedent are required, neither of which existed under the instant circumstances. Further, under note 7, the *Miller* Court explained - agreeing with the California Supreme Court - that if there was no subpoena, as in *Burrows*, that Burrows was entitled to standing.

CONSIDER:

* While the IRS did obtain a court ordered subpoena in *Miller*, the Tax Commissioner herein did not.

* While the IRS's search, in *Miller*, was limited in scope, confined to *Miller* only, the Tax Commissioner's search was massively conducted into the records of 20.000 businesses, absent probable cause or any of the incidents

normally associated with a lawful search. Obviously, under the aforementioned circumstances, no court would have issued a subpoena and so none was sought by the Commissioner.

* While the IRS's search in *Miller* was lawful at its inception - the Tax Commissioner's search was not, lacking a court ordered subpoena.

* While the IRS in *Miller* obtained the records pursuant to a subpoena duces techum, the Tax Commissioner obtained the records of 20,000 businesses via duress, threats and intimidation.

In *Miller*, it is absolutely clear, under notes 6 & 7, that LEGAL COMPULSION must be employed, not duress, threats, intimidation or abuse, as practiced by the Tax Commissioner, in order to obtain the massive amounts of documentation sought from the wholesalers. Further, in support of its position, the majority to include the approval of the dissenters held at note 6 (2nd par.) that:

> "We are not confronted with a situation in which the Government through unreviewed executive discretion has made a wide-ranging inquiry . . . Here the Government has exercised its powers through narrowly directed subpoenas ducem techum subject to legal restraints attendant to such process. "

Here, it is precisely those unlawful circumstances referred to under note 6 - which now confront this Court, and which were not present in *Miller*, but apparently viewed by said Court with great concern and alarm. It is further apparent that *Miller* would have been decided differently, if the facts were, as they are, in the instant circumstances. Under note 7, at 445 - it was deemed significant:

> "...that the bank in *Burrows v. Superior Court*, 13 Cal. 3d 238; 529 P. 2d 590 (1974) provided the statements

to the police in response to an INFORMAL ORAL REQUEST for information." *{emphasis added}*

(In *Burrows*, because of the informal request for the records- and consequently, not legal compulsion, it was held that *Burrows* was entitled to standing, in which the *Miller* court concurred.) Here, neither the lower courts nor the Respondents addressed *Miller* and, accordingly, attached no significance to any of the circumstances cited above by the Petitioners, which were far more egregious than any of the mitigating circumstances discussed or contemplated in *Miller*.

C. Bright Line Established Under *Miller*

Significantly, not a single case can be found where standing was denied, as in the instant circumstances, where the records were unlawfully and coercively obtained to encompass an overlybroad search, as described in note 6.

Moreover, under *Miller*, the seminal third party search and seizure case, it was held that for a third party search to be lawful, as a condition precedent or bright line established thereunder, that lawful compulsion must be utilized to obtain the records sought, not threats or intimidation. Moreover, that the search must be limited.

The Petitioners look forward to a thorough venting of the issues presented herein so that this matter may be satisfactorily resolved and our system of justice materially advanced. A nation of laws - not men - can do no less.

The several lower Courts, by their failure to incorporate *Miller* in their decision making processes have raised serious questions about the undue deference accorded the State, while ignoring the compelling issues presented by the Petitioners. This is deeply troubling, since this Court's *Miller* decision has been cited approximately 700 times in Shepard's and numerous times by the same New York Courts when its rulings favored the executive branch, but ignores it

now, when it clearly favors the taxpayer. Moreover, it does so without any reasoned explanation. Adding to these puzzling circumstances, are the facts asserted herein, which heretofore were uncontested and unaddressed, as if contaminated by the plague or some other contagious disease.

D ROD's Unlawful Published Objectives

New York State desperately in need of tax revenue, but severely handicapped by a woefully inadequate audit staff, decided to adopt measures calculated to obtain the additional revenues sought by any means possible - whether fair or foul. After all, what taxpayer would have the temerity to complain about the tax authorities unlawful practices and/or procedures. To aid in this endeavor, the Revenue Operations Division (ROD) was formed with the stated published objectives of developing:

> " . . . an organization UNENCUMBERED BY TRADITIONAL BUREAUCRATIC RESTRAINTS."

The ROD further asserted therein that this:

> " . . . program is innovative, energetic, FREEWHEELING, and impact oriented."
>
> *(emphasis added)*

Later, Mr. Hicks, then head of the ROD would say for the Hudson Register-Star newspaper publication, when commenting on the advance in computer technology, that:

> "We're in our infancy and in five or ten years we'll have the universe of New York in a file and we'll be able to know everything there is to know about everybody."

E. Actions Consistent With The ROD's Published Objectives

Armed with its shameful objectives of "freewheeling, unencumbered restraint," the Commissioner proceeded to implement the blueprint for taxpayer abuse consistent with his published objectives, by commencing the largest unlawful

search in the annals of American jurisprudence. Demands which had no regard for the protections afforded taxpayers under both Federal and State constitutions. These demands encompassed the records of 20,000 businesses whose only known crime was the sale of liquor, wine and beer products. Hardly a basis for engaging in such a massive "fishing expedition" over a four year period, absent court approval.

Totally lacking in probable cause, the Commissioner obtained the wholesalers' records pursuant to 20,000 businesses via *written threats and intimidation*, but absent judicial sanction. These overt threats required the wholesalers to submit all of their customers' purchase records over a four year period - or face the consequences of being audited on every conceivable tax known to the western world.

Consequently, based upon the written threats, the Commissioner obtained the business records via coercion and intimidation, but absent the freely given consent of the wholesalers or the legal compulsion contained in a subpoena duces techum, as required under this Court's holding in *U.S. v. Miller*, notes 6 (2nd par) and 7.

Under the given circumstances, the petitioners assert that the *Miller* doctrine is absolutely controlling on the issue of third party search and seizures to include standing. In accordance therewith, it is further asserted that the petitioners have standing under *Miller*, since the search was both unlawful and overly broad at its inception.

Argument

A. National Importance of the Instant Case

Of some significance, is the fact that this Court does not appear to have addressed the issue of third party search and seizures since it did so in 1976 with its *Miller* decision. Moreover, this matter represents the most egregious third party search in the annals of American jurisprudence.

Significantly, New York courts, without addressing notes 6 and 7, have reached decisions which conflict materially from that rendered by this Court on the issue of standing. Further, this is the only court which can now remedy the injustice described herein. Its importance to the citizens of New York and this nation cannot be over emphasized.

Seldom in annals of American jurisprudence has a decision of this Court been treated with such utter disdain by any Court, much less New York's Court of Appeals, on a matter of such immense constitutional dimension.

Not only do the New York Courts disagree with this Court's decision in *Miller v U.S.*, notes 6 and 7, but inexplicably decline to explain their reasons for disagreement.

This Court held in *Miller*, the seminal case, that Miller lacked standing to contest the subpoena duces tecum, since the IRS obtained a court ordered subpoena which was narrowly confined to Miller. However, this Court further held under Notes 6 and 7 thereof, that Miller would have enjoyed standing - if the IRS had failed to obtain a court ordered subpoena - and if the search was wide ranging. Precisely, the conditions precedent which prevail under the instant circumstances.

Moreover, to add further emphasis and understanding to the *Miller* Court's holding under note 7, this Court concurred with the *Burrows* decision granting standing, in a case similar to *Miller*, with one important distinction.

Access to the Burrow's records was obtained under an informal request for the records - not a subpoena - hence standing was acquired by Burrows under the *Miller* holding.

Frankly, nothing could be clearer than this Court's endeavor to clarify its holding in *Miller*, if one were needed, by issuing note 7. Otherwise, if the Tax authorities could operate without a subpoena, then absolutely no restraints whatsoever

would be imposed upon the Tax Commissioner when pursuing businesses. In effect, rendering the Courts a nullity by judicial fiat.

Under the circumstances, is it too much to ask from the tax authorities, to obtain a subpoena duces techum to insure the validity of its search, in conformance with the rule of law?

The Tax Commissioner knew full well that no court would sanction the issuance of an overlybroad subpoena duces techum, absent probable cause, to include other incidents normally associated with a lawful search.

That fact was evidenced by an action brought by the *New York State Automotive Wholesalers Association, Inc., and Ellwood Auto Parts, Inc. vs the N.Y,S. Tax Commissioner*, which sought to enjoin the Commissioner from continuing his threatening and intimidating tactics in the pursuit of automotive parts business records. In that matter, Justice Edward O. Spain ruled that the issue was not ripe, but would become so, if the Commissioner sought a subpoena duces techum. However, the Commissioner believing that discretion was the better part of valor - simply walked away - declining to seek a subpoena, since he knew that it was a fruitless endeavor - and would lay bare his improvident conduct. (see: Letter Decision/Order dated May 2, 1994, Appendix D, pages A9-A10)

Under the instant circumstances, no subpoena was legally possible for the demanded information. Yet via written threats and intimidation, said information was obtained. Still New York's Court of Appeals held that "no substantial constitutional issue was directly involved", without any reasoned explanation.

Over the past 26 years, *Miller* has been cited in Shepards approximately 700 times, yet no taxpayer has been able to successfully cite *Miller* even once in connection with notes 6 and 7, until now. Why? Because heretofore no one, other than NYS's Tax Commissioner, has strayed so far off the

constitutional reservation by recklessly violating every single commandment contained in the Fourth Amendment, inter alia. The unlawful practices and procedures, as previously and hereinafter described, permits this court for the very first time to invoke the *Miller* Doctrine, as contained in the aforesaid notes 6 and 7, on behalf of taxpayers. Said notes confer standing upon the petitioners since the Commissioner's coercive search into the records of 20,000 business was performed through "unreviewed executive discretion" involving the largest search in the reported annals of American jurisprudence.

Surely this now becomes a matter of great public interest and substantial constitutional dimension. This is especially true in view of the Tax Commissioner's unilateral abrogation of every single commandment contained in both Federal And State constitutions re search and seizure.

Obviously - and for first time in 26 years - a Petitioner can successfully employ *Miller* notes six and seven in establishing standing. Accordingly, this Court must now address the facts, and its own constitutional case law, heretofore ignored by the New York courts.

B. Ellsberg/Pentagon Papers Analogy

If this Court recalls, the executive branch of government broke into Daniel Ellsberg psychiatrist's office in an effort to obtain evidence designed to discredit him. Accordingly, let us now compare the circumstances then, to the instant circumstances and see how differently each matter was treated despite the similarity of the unlawful actions:

	Ellsberg	Instant Matter
Third Party:	Psychiatrist's office	Liquor Wholesalers
No. of parties:	One	20,000 businesses
Info Obtained:	No legal process	No legal process
Method:	Burglary	Threats, intimidation
Authority:	None	None
Consequences:	President almost Impeached	Tax Commissioner's Actions Ignored

C. Consent Issue

The issue of consent is determined upon the totality of the surrounding circumstances. The intent to waive the constitutional immunity to an illegal search must be positively established, and the waiver of consent must be shown by convincing, clear and convincing or clear and positive evidence, and the burden of proof RESTS UPON the party alleging the waiver.

In order to constitute a waiver it must be clearly shown that consent given to an otherwise illegal search was voluntary and free from coercion, duress or fraud and not merely given to avoid resistance and/or submission to apparent authority.

Case law holds as follows:

1) *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973):

> " ..... voluntariness is to be determined from the totality of the surrounding circumstances."

2) *People v. Long*, 508 N.Y.S. 2d 774, citing *Schneckloth v Bustamonte*, 412 U.S. 218, 227 (1973):

> "Whether consent is given voluntarily or is the product of police coercion, express or implied, is a question of fact to be determined by the totality of the circumstances."

3) *U.S. v Ramos*, 753 F. Supp. 75 (1990):

> Government has the burden of proving that consent to search was obtained freely, and that burden is not satisfied by mere submission to claim of lawful authority.

4) *U.S. v Egan*, 501 F. Supp 1252 (1980):

> In order for consent to a Fourth Amendment 3rd party search to be valid, the government must demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied;

voluntariness is a question of fact to be determined from all of the circumstances.

Consider the facts:

a) The information obtained under color of law, was the product of duress, threats and intimidation, as evidenced by exhibit 9-3 at page 20 *(Petitioners Brief before N.Y. State's Court of Appeals; Supreme Court, 3rd Appellate Division, etc., below)*, a letter dated August 13, 1992, from the New York State Department of Taxation and Finance, Revenue Opportunity Division ("ROD" herein), which threatened substantial tax audits, if the wholesalers failed to comply with the Commissioners demand for massive amounts of documentation on computer disc.

b) The unfettered right of consent implies the requisite knowledge of the right to refuse consent. At the time the wholesalers consented to supply the requested information they were unaware of their right to refuse said request.

c) Based upon the threats employed, it is doubtful whether the wholesalers would have refused the Commissioner's demands under the circumstances.

Consequently, the wholesalers did not voluntarily consent to supply the documentation within the meaning of the law.

D. Due Process: The Right To Be *Meaningfully* Heard

The right to be heard has generally been understood to be an inalienable right of every American citizen. Not so, according to the Respondents. Despite the fact, that 20,000 businesses were subjected to a massive, warrantless, exploratory computer search, absent probable cause or any other lawful requirement, no notification thereof was furnished the taxpayers so that the matter could be contested - in a Court of Law where it belonged. Accordingly, a 1983 N.Y.S. Court of Appeals decision was rendered in: *Burtnieks v. City of New York*, 716 F. 2d 982 (1983) which held that:

> "The fundamental requisite of due process of law is the opportunity to be heard and that opportunity must be granted at a meaningful time and in a meaningful manner."

Also, under *U.S. v Miller*, 425 U.S. 435 (1976), "the failure to provide the taxpayer with prior notification of the search was considered a fatal constitutional defect" by Justice Brennan.

E. Circumstances Demonstrating Tax Commissioner's Blatantly Unconstitutional Conduct

1. US. Fourth Amendment and NYS's Article 1 Section 12

In an endeavor to improve the State's flagging tax collection efforts, the Commissioner engaged in unlawful practices and procedures which, in fact, unilaterally expunged every single commandment contained in both the U.S. Fourth Amendment and New York's Article 1, Section 12.

The basic purpose of the fourth Amendment was to protect the people against wrongful governmental infringement of personal security, liberty and private property. While the fourth amendment itself does not define unreasonable search and seizure, both the U.S. Supreme Court and NYS's Court of Appeals have held that a search, in order to be reasonable, must be conducted pursuant to a court authorized subpoena or search warrant issued by a judge upon probable cause. Probable cause is defined as that degree of certitude which provides a reasonable ground for a belief that a crime may have been committed.

More than a mere procedural formality, is the requirement that for a search to be valid - it must not proceed upon mere suspicion, or in furtherance of a general exploratory " fishing expedition " and must be based upon probable cause. Moreover, the determination as to whether probable cause exists must be left to an impartial judicial officer, not

government agents. A further safeguard requires that no warrant or subpoena may be issued based upon a general search or writ of assistance. Nor may it be issued pursuant to a "fishing expedition" in pursuit of clues to potential wrongdoing.

The instant circumstances evidence that the Tax Commissioner recklessly violated every single commandment contained in both the U.S. Fourth Amendment and New York State's Article 1, Section 12 thereof, when it proceeded to engage in a subpoenaless, warrantless, coercive, massive exploratory "fishing expedition" absent probable cause and specificity in a lawless search for clues to potential wrongdoing pursuant to the records of 20,000 businesses over a period of four years. Accordingly, all of the incidents normally associated with a lawful search were flagrantly disregarded in furtherance of some dubious governmental interests, when contrasted with the importance of the protections bequeathed New York State citizens under both federal and state constitutions.

2. Specific Constitutional Transgressions

Consider the following constitutional transgressions all of which are unchallenged :

a. No court ordered subpoena or search warrant or compulsion by legal process was issued prior to engaging in the third party search of 20,000 businesses.

b. No probable cause was established prior to engaging in a massive exploratory fishing expedition - the largest in the recorded annals of American jurisprudence – which perhaps explains why no subpoenas were sought in the first place.

c. The search conducted was totally lacking in specificity.

d. The search was unreasonable by any standard or measure.

e. The search was coercive since it employed threats and intimidation rather than compulsion by legal process.

f. The search was violative of due process since none of the alleged 20,000 suspects was afforded the opportunity of contesting the legality of the search prior to its commencement.

By the Commissioner's actions, every single commandment contained in both the U.S. Fourth Amendment and New York's Article One, Section 12, was violated. The facts, as supported by substantial and unchallenged documentation, clearly demonstrates the validity of those assertions. Moreover, neither the Commissioner nor anyone else has heretofore challenged these unassailable facts. And why not? Because the Commissioner dare not in the face of such overwhelming and dispositive evidence. Nevertheless, all of the prior Courts have allowed him to get away with it despite overwhelming evidence of unprecedented unlawful conduct without one word of condemnation.[1]

F. Effect of Constitutional Trangressions re Bill of Rights

None of the above cited transgressions are consistent with the requirements of both Federal and State constitutions. Especially when, those actions were deliberately executed at the behest of the highest levels of the executive branch - as evidenced by the testimony, documentation, uncontested facts, to include the ROD's statement of objectives, inter alia.

Is that what the Framers intended? If so, why would they incorporate the Fourth Amendment into the Bill of Rights? Is the meaning thereof, so obtuse, that no New York court can interpret its plain unvarnished language.

If the New York Courts have no intention of enforcing the provisions of the Constitution, then they ought to candidly inform its citizens of that fact, so that both its resources and those of the taxpayers are not needlessly wasted. Heretofore,

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[1]. For evidence of impermissible conduct - and for a discussion thereof, please see pages 20-24.

the New York Courts have enjoyed a magnificent record in the field of constitutional law, to which the entire nation is indebted - which explains why, the instant decision appealed from is so astonishing.

G. <u>Lower Courts Prior Erroneous Decisions</u>

More specifically:

1. The ALJ and TAT [N.Y. Tax Appeals Tribunal)decisions held that regulated businesses are not subject to the protection of the U.S. 4th Amendment despite two NYS Court of Appeals contrary holdings in the *Matter of Finn's Liquor Shop v. State Liquor Authority*, 24 N.Y. 2d 64 (1969), and *People v. Keta*, 583 N.Y.S. 2d 920, 931 (1992). Moreover, two U.S. Supreme Court decisions likewise held contrary views to those expressed by the Administrative Courts in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967). See pages 17-19.

2. Additionally, this was a sales tax matter to which both regulated and nonregulated businesses were subject without distinction. Further, there is no provision in New York State or Federal case law, to treat regulated businesses any differently from those which are unregulated, with regard to constitutional mandates.

   Accordingly, how could both the ALJ and the TAT render decisions contrary to New York State's Court of Appeals strong holding in *Finn's Liquor Shop* and *People v. Keta*? No reasoned explanation or defense thereof has been forthcoming for the said implausible decisions by either the Respondents or the subsequent reviewing Article III courts. Their findings on other issues in this matter are equally troubling and incomprehensible. Unfortunately, neither of the reviewing article III Courts took any notice thereof, or provided any remedial guidance to the administrative courts. Meanwhile, the ALJ and the TAT will continue to believe, as they have -

that Regulated businesses are not subject to the protections of the Fourth Amendment - allowing them, to remain in a constitutional Disneyland of misguided perceptions.

3. New York State's Supreme Court, Appellate Division. Third Department, ignored the ALJ's and TAT's improvident constitutional ruling - and then proceeded to compound the above cited error with one of their own. It erroneously held that the Petitioners lacked standing despite this Court's *Miller* ruling, under notes 6 and 7, which granted standing in the event that no subpoenas were obtained and that the search was overlybroad. Both sets of required circumstances were absent when the Tax Commissioner's oath to uphold the constitution was flagrantly violated - and consequently, standing was conferred upon the Petitioners.

Miller, the controlling third party search and seizure case is cited 700 times in Shepards, yet no New York Court addressed its findings or explained why it differed from this Court with reference to notes 6 and 7.

We reiterate, notes 6 and 7 held that the petitioners had standing in view of the fact that no subpoena duces techum was obtained nor was any other form of judicial sanction - and that the third party search was outrageously overlybroad, encompassing 20,000 businesses.

H. <u>Additional Relevant Case Law</u>

Once Standing has been established, it is incumbent upon the Petitioners to cite additional case law for purposes of obtaining a favorable verdict. The Petitioners' now wish to focus the Court's attention on just six cases, as follows :

1. *People v. Keta*, 583 N.Y.S. 2d 920 (1992):

   a) "We have never suggested the existence of a generalized, wholesale exception to the warrant and probable cause requirements that may be invoked

whenever necessary to enhance the effectiveness of the State's law enforcement efforts." (*Keta* at 937)

b) The U.S. Supreme Court held in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967). " . . . that the Fourth Amendment applies to searches undertaken for regulatory purposes as well as to searches for criminal evidence." 583 N.Y.S. 2d 920,932

c) Obviously the government's interest in law enforcement is always, by definition, "substantial" . . . (*Keta* at 936)

> "If these were the only criteria for determining when citizens' privacy rights may be curtailed there would thus be few, if any, situations in which the protections of Article I, section 12, would operate. Indeed, the very purpose of including such protections in our Constitution was to provide a counterbalancing check on what may be done to individual citizens in the name of governmental goals. (*Keta* at 936)

2. *Matter of Charles A. Ahearn*, 23 N.Y. 2d 916, 917:

> "It is ancient law, that no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the prospect of *possible* violations of the law being discovered . . . " *(emphasis added)*

3. *Silverthorne Lumber Co. v United States*, 251 U.S. 385, 392 (1920) held, when it extended the exclusionary rule to the fruits of illegal searches and seizures: that:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

The rationale behind the *Silverthorne* Court's decision was that the government should not be permitted to profit from its illegal activities. Numerous cases may be cited which employ virtually the same, if not identical language, much of it derived from *Silverthorne*.

4. *People Ex Rel Lemon v. Supreme Court*, 245 N.Y. 24 (1927) Judge Cardozo writing for a unanimous N.Y.S. Court of Appeals held that:

> "Documents are not subject to inspection for the mere reason that they will be useful in supplying a clue whereby evidence can be gathered. Documents to be subject to inspection must be evidence themselves." (at 29)

5. *U.S. v. Rabinowitz*, 339 U.S. 56, 62 (1950):

> "Full blown searches, dragnets, wholesale rummaging through possessions, or FISHING EXPEDITIONS in search of potential evidence are prohibited by the fourth amendment: such EXPLORATORY SEARCHES can not be undertaken by the government with or without a warrant. " *(emphasis added)*

6. Under *Matter of Finn's Liquor Shop v. State Liquor Authority*, 24 N.Y. 2d 647 (1969) it was held that:

> "No State may require as a condition of doing business a blanket submission to warrantless searches at any time and for any purpose." (at 658)
>
> "It is no longer subject to question that State agencies, charged with purely administrative responsibilities, just as those engaged in criminal law, must conduct themselves in compliance with constitutional requirements in conformance with the FOURTH AMENDMENT." *(emphasis added)*

Under the circumstances, and as evidenced herein, the actions of the Tax Commissioner were clearly unlawful, forever poisoning the fruit of its unconstitutional endeavors - and which, by virtue thereof, have made said " fruit " inadmissable in every court which has seriously considered a comparable matter.

The fact is, however, that no government agency has so flagrantly violated or trashed both Federal and State constitutions with such reckless abandon as has the Tax Commissioner. Obviously, the Commissioner's conduct belongs in Ripley's or the Guiness book of world records for Taxpayer abuse.

I Evidence in Support of Commissioner's Unlawful Conduct

Evidence pursuant to the Tax Commissioner's unconstitutional policies, practices and procedures violative of both State and Federal Constitutions and its legislative mandate to include case law may be readily ascertained from exhibits 6, 8, 9-1 through 9-7, and as described hereunder.

1. Exhibit 9-3: Letter of August 13, 1992, reflects the coercive nature of the State's demands for information when in part it wrote therein:

> "Failure to respond will result in either the issuance of a subpoena or the referral of your file for audit which may include additional sales tax areas and a review of your tax compliance in other areas administered by the Department of Taxation and Finance."

2. Re Exhibit # 9 - 1: Letter of January 7, 1992

   On January 7, 1992, the Revenue Opportunity Division (ROD) of the New York State Department of Taxation and Finance wrote to every liquor wholesaler in the state demanding a computer record of all of its sales to every tavern, restaurant, grocery store, liquor

store and all other establishments selling liquor and wine products at retail for the calendar year 1991.

Upon reluctant wholesaler compliance therewith - approximately 20,000 businesses, engaged in the sale of liquor, wine and beer were subjected to tax scrutiny pursuant to a massive, coercive, subpoenaless, warrantless, search for clues to potential wrongdoing, absent probable cause and without any prior notification to the taxpayers - consequently, denying said taxpayers any opportunity to contest the legality thereof prior to the submission of said records under the apparent authority doctrine.

Also, exhibit 9-1 is likewise important pursuant to Exhibit 6, a memorandum dated (2/3/93) from George Schermerhorn to Dave Jos of the Brooklyn Sales Tax audit division advising that Roebling Liquors should be audited based upon third party 1991 information obtained from wholesalers. That memorandum (Exhibit 6) provides an absolute link between the unlawful massive searches re Exhibit 9-1 to include the information obtained therefrom, and the audit of Roebling Liquors commencing August 18th, 1993.

3. Re Exhibit 9-2, Letter of: March 24, 1993, additional requests for all sales/purchase information were demanded to include the calendar years : 1989, 1990 and 1992. These overly broad requests for information, under color of law, were likewise reluctantly complied with by the wholesalers.

   The enormity of the State's massive, coercive, warrantless, invasion of 20,000 businesses over a 4 year period, absent probable cause, judicial sanction, inter alia, required the examination and matching of approximately 4,800,000 records. Accordingly, never before in the reported annals of American jurisprudence has any search and seizure operation been so massively

conducted or so aggressively pursued without probable cause and/or judicial sanction.

4) The aforesaid exhibits additionally reflect coercion and subsequent submission to authority, as evidenced by the liquor wholesalers compliance therewith under threat of subpoena, tax audits, or worse.

Moreover Exhibit 9-7 : Letter of March 27, 1996, further reflects the coercive nature of the Tax Commissioner's demand for information as described by one of the wholesalers' attorneys who advised that his client:

> " . . . received repeated inquiries, both written and telephonic, for such information by various representatives of the State. As a result of such, information was provided on computer disc since we believed we had no alternative other than to fully cooperate and comply with the Department's requests."

note: Names of both the wholesaler, and its attorney, to include any other identifying information was redacted to preclude any further harassment by the State.

5) Exhibit 9-4 - Letter of: March 27, 1996 at A-7.

The coercive nature of the State's demands for money and/or information continue, in part, as follows:

> "Failure to respond to this request may result in an assessment being issued based on known purchase information using the industry standards for mark-ups, or referral of your case for a field audit."

In the above circumstances, the State is demanding taxes without an audit pursuant to industry-wide mark-up standards DESPITE THE ABSENCE of any industry wide standards. These State demands are clearly violative of both the spirit and intent of *Chartair, Inc. v. State Tax Commission*, 411 NYS 2d 41

(1978) and its numerous progeny. Moreover what section of the NYS Taxation and Finance's legislative mandate authorized such flagrantly abusive conduct under color of law? Neither the Tax Commissioner, nor the article I courts or anyone else for that matter has pointed out with any particularity where such authority originated or whether, in fact or law, it exists.

6) Re Exhibit 9-5 - Letter of: May 15, 1996:

The coercive nature of the Commissioner's demands for money and/or information continue unabated, in part, as shown below:

> "Failure to respond to this request may result in the referral of your case to the audit division for further review."

Also, judicial notice must be taken of the unprincipled, shameless and shocking objectives of lawless intent, as expressed by Fred Hicks, Director of the Revenue Opportunities Division, as reflected in exhibit 9-6 and in the ROD's statement of objectives as reflected in Exhibit # 8. (see page 6)

How were these objectives to be achieved? By running roughshod, under color of law, over the constitutional protections afforded the citizens of New York under both Federal and State constitutions. Without probable cause or judicial sanction of any kind, operating under color of law, the Tax Commissioner chose to act as the British had done two hundred years earlier - an action which so inflamed the colonists that it led to the Revolutionary War.

Surely, the deplorable objectives expressed by Mr. Hicks and by the ROD's statement of objectives must raise the hackles of every single judge or justice who takes his/her oath to uphold the constitution seriously. What more does this court need to know to take prompt

and decisive action calling for a halt to this cancer growing on our constitution. However, there is more, much more.

7) The Tax Commissioner made no prior disclosure to the 20,000 businesses that all of its purchase records were being sought from wholesalers, thus denying said businesses any opportunity to contest the validity of the coercive, warrantless, overlybroad, massive, exploratory "fishing expedition" in search of clues to potential wrongdoing, absent probable cause or any of the incidents normally associated with a lawful search.

8) No authority can be found anywhere under NYS's constitution or statutory law which provides a legislative license to engage in a coercive, massive exploratory " fishing expedition " in the pursuit of clues to potential wrongdoing, absent probable cause, or any of the incidents normally associated with a lawful search.

J. Joseph Catalina's Testimony

The direct testimony of Mr Catalina, the Director of the Revenue Opportunity Division (ROD), on May 20th, 1997 establishes beyond a shadow of a doubt that no judicial approval for the massive search was sought; that the ROD was in a search for potential clues to wrong doing; that the search was coercive and intimidating; that it was overlybroad, totally devoid of specificity; and that there was no probable cause. Consequently, the search was unlawful at its inception under well settled case law and both Federal and State constitutions. Accordingly, it was no accident that the Respondents, the Administrative courts, and the Article III courts declined to address any of the facts, issues and relevant case law pursuant to the unlawful search. Why? Because they could not !

1) Joseph Catalina, under direct examination, admitted to having either authorized and/or written the letters

pursuant to the Exhibits 9-1 - 9-5 in accordance with the alleged legal advice obtained from NYS counsel, Messrs. Bill Collins, John Langer and others whose names he was unable to recall. Mr. Catalina further acknowledged that he relied solely upon the aforementioned State attorneys' advice, since he had no personal knowledge of constitutional law or anything else which had a bearing upon the legality of the search. Inexplicably, the alleged legal advice was not in writing. Significantly, the Respondents made no effort to produce the alleged advice givers or even to provide an affidavit from either or any of them, as to their legal advice pursuant to the massive search.

2) Mr. Catalina acknowledges having received the liquor wholesalers' computerized sales information and later conducting a massive "fishing expedition" in accordance therewith.

3) Further, Mr. Catalina admitted that the sole reason for having engaged in a massive exploratory fishing expedition was for the express purpose of obtaining clues to potential wrong doing. Mr. Catalina offered no basis for engaging in a massive search until he had first obtained information pursuant to exhibit 9-1 re the calendar year 1991. Once obtained, this information enabled him to utilize the clues obtained therefrom, allowing any subsequent audits to be performed on a more selective - and/or productive basis.

However, it must be understood that the information obtained absent probable cause may not be justified or made lawful by what the search discovers or turns up. In case law, a search is either good or bad at its inception and does not change character from any success it may have achieved. (See: *People v. Sobotker*, 1978, 43 N.Y. 2d 559 (1978); *People v Alba*, 430 N.Y.S. 2d 923 (1980).

4) Mr. Catalina admittedly never received judicial approval for the massive overly broad search. More importantly, there isn't any authority for the massive fishing expedition, absent probable cause under any circumstances - nor has any authority been cited by any one.

5) Joseph Catalina further admitted that the letters written pursuant to exhibits 9-1 to 9-5 were intimidating, as expressed in the transcript on page 721 at lines 2 - 8. Questions were directed to Joseph Catalina re the August 13th 1992 letter or Exhibit 9-3. In connection therewith, Mr. Catalina was asked to read a portion thereof, as follows at transcript page 719, line 9-13.

> "Failure to respond will result in either an issuance of a subpoena or referral of your file for audit, which includes additional sales tax areas and a review of your tax compliance and other areas administered by the Department of Tax and Finance."

Line 14-16 Question:

> "In that paragraph, aren't you telling them that if you don't give us the information, that we are going to audit you from here to kingdom come?"

Then came some disingenuous responses at the remainder of page 719, 720, which culminated at page 721 with the following question and subsequent response at Line 6, page 721: Question:

> "But again, wouldn't you consider that threatening or intimidating?"

Answer at line 8:

> "SURE IT WOULD BE." (emphasis added)

Despite Catalina's admission that the letter was threatening and intimidating, both the TAT and the ALJ

found that it was not intimidating, contrary to Mr. Catalina 's clear admission that it was. Although Mr. Catalina had earlier indicated that the letters were not intimidating, he was later compelled under close questioning to admit that it was. Clearly it was only common sense based upon the content of the letters themselves - with or without any admission from Mr. Catalina.

Obviously, neither the TAT nor the ALJ were prepared to concede that point since it had an important bearing upon the requirement, under case law, to freely obtain the consent from the parties requested to provide the information.

6) Other crucial points brought out pursuant to Mr. Catalina's testimony which have a considerable bearing upon constitutional case law, were the issues of probable cause, judicial sanction for the massive search, and the seeking of potential clues to wrong doing. Accordingly, further testimony elicited from Mr. Catalina is shown on Transcript Page 698, Lines # 21-24; Page 699, lines 1-4 as follows.

Question:

> "Under the circumstances with respect to the Retail Liquor stores, isn't it fair to say that you were looking for clues to potential taxpayer wrong-doing, you were looking for clues, endeavoring to identify problems or businesses that appeared as if they might not be complying with New York State tax law"? *{emphasis added}*

Answer:

> "THAT'S RIGHT " *(emphasis added)*

Later at transcript page 736, lines 2 to 7 in response to the methods employed by the ROD, Mr. Catalina answered:

> "My method and I'll say this again. I'm repeating myself. My method was only to give an INDICATION to the Audit Division of where they should go out and audit. If you have 30,000 retailers out there, you don't know where to audit. At least my analysis gave them some direction on where they should audit. " *(emphasis added)*

Since Mr. Catalina admitted that he was looking for clues to enable him to tell his auditors where to look - that admission alone has an important bearing on the admissibility of the evidence obtained pursuant to well settled and controlling case law.

Also, the letters themselves were overlybroad in demanding information which likewise brings them into the further ambit of constitutional dimension - and perhaps explains why, the Respondents made no effort to secure court approval for the search. Further, Mr. Catalina's admissions that no judicial sanction was sought for the massive search, likewise has a considerable bearing on controlling constitutional case law.

Inexplicably, none of the above issues were mentioned and/or meaningfully addressed in the Respondents' brief, or in either of the ALJ's and TAT decisions - or in any of the subsequent Article III Courts' decisions. Why?

Primarily, the above cited exhibits 6, 8, 9-1 - 9-7 and Joseph Catalina's testimony, provide the factual basis for the petitioners' constitutional complaint.

SUMMARY

If the above ruling is allowed to stand, a grave and flagrant miscarriage of justice will have been perpetrated without any meaningful review of the facts, and relevant/controlling constitutional case law. Petitioners assert that no confidence may be had in the New York State's Court of Appeals decision rendered without reason or explanation, which on its

face appears implausible and which demeans this Court's holding in *Miller*, notes 6 and 7. Should this Court fail to reverse the prior decision, what will become of the fourth amendment? What message would this Court thereby send to the Tax Commissioner. Is it to GO FORTH AND SIN SOME MORE!!! The clear and unequivocal fact, is that 4th Amendment protections over time, have been greatly eroded. Now, what little remain, may be further eroded, if the Tax Commissioner can do as pleases without oversight or accountability.

Moreover, the Tax Commissioner under the present circumstances, may act and do as he pleases without interference from anyone. Meanwhile, the New York Courts have rendered themselves irrelevant to the third party search and seizure process re businesses - and absolutely of no consequence in the State of New York - if its decisions are allowed to stand. Why ? Because the New York Courts will have refused to enforce the subpoena requirement in favor of the hated writs of assistance. As a consequence thereof, nothing now remains of any of the third party search and seizure protections previously afforded New York businesses. Yet the New York Court of Appeals herein held that: "no substantial constitutional question was directly involved." Say it ain't so!

Additionally, if this Court fails to reverse the instant decision it will have eliminated the need for probable cause, court ordered search warrants or subpoenas, and will have sanctioned unlimited fishing expeditions, lacking specificity, reasonableness, or any of the other incidents normally associated with a lawful search. Moreover, it will have overturned the controlling third party search and seizure case (*Miller*) without having addressed this Court's majority opinion, as reflected in notes 6 and 7.

CONCLUSION

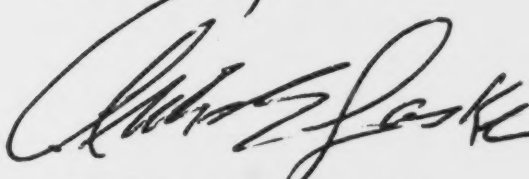
The Petitioners have presented all of the relevant facts and case law. Likewise we have addressed all of the issues previously submitted by the Respondents and/or raised by the Courts. No issue to our knowledge has been avoided and/or circumvented, unlike the Respondents' prior submissions.

Clearly none of the actions taken (as described herein), under the direction of the Tax Commissioner, comport with respect for either Federal or State constitutional law or for its legislative mandate.

In view of the foregoing unlawful, unprecedented assault on both Federal and State constitutions, this petition for a writ of certiorari should be granted so that a thorough airing of the outrageous treatment accorded New York State taxpayers will be subjected to meaningful review.

Dated: May 6th, 2002.

Respectfully submitted,



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Sidney Cooper as officer

APPENDIX

APPENDIX A

COURT OF APPEALS OF NEW YORK

Mo. No. 1325

In the Matter of Roebling Liquors, Inc. et al.,
Appellants,

v.

Commissioner of Taxation and Finance et al.,
Respondents.

December 20, 2001, Decided

NOTICE:
[*1] THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS. DECISION WITHOUT PUBLISHED OPINION

OPINION:

Motion for reconsideration of this Court's October 18, 2001 dismissal order denied.

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CITATIONS:
2001 N.Y. LEXIS 3836

APPENDIX B

COURT OF APPEALS OF NEW YORK

Mo. No. 1135 SSD 65

In the Matter of Roebling Liquors, Inc. et al.,
Appellants,

v.

Commissioner of Taxation and Finance et al.,
Respondents.

October 18, 2001, Decided

NOTICE:
[*1] THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS. DECISION WITHOUT PUBLISHED OPINION

OPINION:

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

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CITATIONS:
97 N.Y. 2d 637
760 N.E.2d 1289 (Table)
735 N.Y.S.2d 493
2001 N.Y. LEXIS 3280

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD JUDICIAL DEPARTMENT

In the Matter of ROEBLING LIQUORS INC. et al.
Petitioners,
v.
COMMISSIONER OF TAXATION AND FINANCE et al.,
Respondents.

Docket 86792

Calendar Date: April 23, 2001
Decided and Entered: June 14, 2001

Arthur Lasker, New York City, for Roebling Liquors, Inc.,petitioner.

Sidney Cooper, New York City, petitioner in person.

Eliot Spitzer, Attorney-General (Andrew D. Bing of counsel), Albany, for Commissioner of Taxation and Finance, respondent.

Before: Cardona, P.J., Mercure, Peters, Spain and Carpinello, JJ.

Cardona, P.J.

Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which, inter alia, sustained an assessment of sales and use tax imposed under Tax Law articles 28 and 29.

As part of an investigation of suspected underreporting of sales tax by retail liquor distributors, the Revenue Opportunity Division of the Department of Taxation and Finance (hereinafter Department), sent letters to various wholesalers of alcoholic beverages located throughout the State requesting, inter alia, their retail customer sales records for various tax years. As a result of information received through the investigation, the Department conducted an audit of the sales tax records of petitioner Roebling Liquors Inc., a retail liquor establishment located in Brooklyn, for the period of September 1, 1990 to May 31, 1993. The Department issued separate notices of determination in December 1993 to Roebling and its president, petitioner Sidney Cooper, assessing additional sales tax together with interest and penalties. Roebling and Cooper sought review of the assessments.[1]

Following a conciliation hearing, the conferee approved reduced tax assessments. Petitioners did not consent to the proposed resolution and, on May 12, 1995, separate conciliation orders were issued, assessing petitioners with delinquent taxes along with penalties and interest. An Administrative Law Judge (hereinafter ALJ) confirmed the conciliation conferee's decision with some modifications, giving petitioners credit for certain inventory, purchase discounts from wholesalers and pilferage. Respondent Tax Appeals Tribunal (hereinafter the Tribunal) rejected the majority of petitioners' exceptions and upheld the basic decision of the ALJ.[2] Petitioners thereafter commenced this CPLR article 78 proceeding seeking to challenge the Tribunal's determination.

Initially, we are unpersuaded by petitioners' contention that the Department's use of the third-party wholesalers' data amounted to an unreasonable search and seizure in violation of the Federal and State Constitutions. It is well settled that a party does not have standing to challenge an alleged

unconstitutional search and seizure which is suffered by a third party (see, United States v Payner, 447 U.S. 727, 731). Moreover, the constitutional provisions cited by petitioners protect individuals only where a legitimate expectation of privacy is at stake (see, People v Quackenbush, 88 N.Y.2d 534, 541) and, clearly, petitioners had no legitimate expectation of privacy in the particular documents herein that were maintained by third parties with whom they had business dealings.[3] In fact, the wholesalers themselves would have a limited expectation of privacy in their business records (see, Matter of Glenwood TV v Ratner, 103 A.D.2d 322, 328, affd 65 N.Y.2d 642, appeal dismissed, cert denied 474 U.S. 916; see also, People v Quackenbush, supra, at 541-542). Significantly, each liquor wholesaler is required to keep records of every sale in the form required by respondent Commissioner of Taxation and Finance (see, Tax Law § 1135[a][1]). In addition, each liquor wholesaler must make such records available for inspection and examination at any time on demand by the Department (see, Tax Law § 1135[g]). Therefore, petitioners' claim that the Department exceeded its statutory authority in gathering the third-party data is without merit.

We are similarly unpersuaded by the remaining arguments set forth on behalf of petitioners in Cooper's pro se brief. First of all, we do not agree that the notice of determination against Roebling should be cancelled due to the Department's failure to serve the determination properly. We do not find error in the holding that the notice was presumptively received by Roebling. Significantly, "[t]he mailing of a notice of determination of sales tax liability gives rise to a rebuttable presumption of receipt" (Matter of Mareno v State of New York Tax Commn., 144 A.D.2d 114, 115; see, Tax Law § 1147[a][1]) and, upon this record, petitioners did not sufficiently rebut that presumption (see, Matter of T.J. Gulf v New York State Tax Commn., 124 A.D.2d 314, 316).

Next, petitioners argue that the conciliation orders issued to them were not timely. They must be served within 30 days after the proceeding is concluded (see, Tax Law § 170[3-a][e]). A proceeding is concluded when, among other things, the party requesting the conciliation fails to agree to the proposed resolution within 15 days of its issuance (see, 20 NYCRR 4000.5[c][3][iii]). Here, a proposed resolution was issued on March 31, 1995. Petitioners did not consent and, thus, the proceeding was concluded as of April 15, 1995 (see, id.). Since the conciliation orders were issued to petitioners on May 12, 1995, the 30-day requirement was not violated.

Furthermore, it is alleged that the Department was not justified in resorting to external data for the audit given the fact that the Department's auditor preliminarily found nothing amiss with petitioners' books. That initial finding was made before the auditor was apprised that petitioners' sales data did not correspond with the purchase data provided to the Department. The irregularities justified the Department's concern that petitioners' records, while appearing complete, were in fact unreliable. Under the circumstances, the use of the outside data was permissible (see, Matter of Cook v Tax Appeals Tribunal of State of N.Y., 222 A.D.2d 962, 964; see, Tax Law § 1138[a][1]). Notably, "[t]he burden is upon the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable" (Matter of Del's Mini Deli v Commissioner of Taxation & Fin., 205 A.D.2d 989, 991; see, Matter of Mobley v Tax Appeals Tribunal of State of N.Y., 177 A.D.2d 797, 799, appeal dismissed 79 N.Y.2d 978). Although Cooper advances several contentions challenging the audit method employed, the results achieved and the credits given for inventory and pilferage, we do not find that petitioners met their required burden.

Cooper also maintains that the three-year Statute of Limitations (see, Tax Law § 1147[b]) renders unreviewable the fiscal quarters ending November 30, 1990 and February 26, 1991. We note that the Statute of Limitations does not begin to run until a tax return has been filed (see, Tax Law § 1147[b]) and, as found by the Tribunal, the record contains no evidence as to the date or dates on which Roebling filed its sales tax returns for those time periods (see, Tax Law § 1136[b]). Additionally, in reference to the contention that the tax penalty was incorrectly assessed, we note that the 30% aggregate amount referenced in Tax Law § 1145(a)(1)(i) relates to the maximum interest that may be charged in a given tax period and not over an entire audit period.

All remaining issues raised by petitioners and not specifically addressed herein have been examined and found to be lacking in merit.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

Mercure, Peters, Spain and Carpinello, JJ., concur.

NOTES:

1. Prior to the commencement of the administrative hearing, petitioners commenced a CPLR article 78 proceeding challenging, inter alia, the Department's practice of compelling wholesale liquor distributors to disclose retail sales information. This proceeding was dismissed by Supreme Court as untimely commenced and this Court affirmed (Matter of Roebling Liqs. v Urbach, 245 A.D.2d 829, appeal dismissed, lv denied 91 N.Y.2d 948).

2. The Tribunal disagreed with the ALJ's decision that it did not have jurisdiction to consider Roebling's petition because Roebling allegedly did not timely reply to the separate notice of determination sent in December 1993. The Tribunal agreed with the ALJ's conclusion that Roebling received the notice, however, since both Roebling and Cooper were considered to have timely protested the notices and both participated in the conciliation conference and were issued separate conciliation orders, the Tribunal deemed jurisdiction to be present.

3. Notably, the absence of a cognizable 4th Amendment claim due to lack of standing also forecloses petitioners' due process claims inasmuch as no protected right of petitioners is implicated (see, United States v Payner, supra, at 737 n 9).

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CITATIONS:

728 N.Y.S.2d 509 (A.D. 3 Dept. 2001)
284 A.D.2d 669
2001 N.Y. Slip.Op. 05399
2001 N.Y. App. Div. LEXIS 6236

APPENDIX D

STATE OF NEW YORK
SUPREME COURT CHAMBERS
OLD COUNTY HEALTH BUILDING
61 STATE STREET
TROY, NEW YORK 12180
(518) 270-3707
FAX (518) 270-0066

EDWARD O. SPAIN
JUSTICE

PAUL G. TOOMEY
LAW CLERK

May 2, 1994

John D. Chestara, Esq.
1489 Maple Hill Road
Castleton, NY 12033

G. Oliver Koppell, Attorney General
State of New York
The Capitol
Albany, NY 12224

RE: New York State Automotive Wholesalers Association, Inc., and Ellwood Auto Parts, Inc.
v.
James W. Wetzler, as Commissioner, New York State Department of Taxation and Finance;
Supreme Court, Albany County Special Term 1/28/94
RJI No. 01-94 ST4699; Index No. 95-94; Cal No. 11

LETTER DECISION AND ORDER

Dear Counselors:

Petitioners' applications for an order to enjoin, restrain, or stay pursuant to CPLR Article 78 and for a preliminary injunction pursuant to CPLR §6301 are denied. It is the opinion of this Court that the applications are premature considering that the Department of Taxation has merely requested information. The issues raised by the petition will become ripe only if and when the Department responds to the failure to comply with the requests in a manner which oversteps their authority. A declaratory judgment is inappropriate at this time.

This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Letter Decision and Order, are being returned to the applicant. The signing of this letter shall constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section, respecting filing, entry, and notice of entry.

SO ORDERED

EDWARD O. SPAIN, J.S.C.

Papers Considered:

1. Notice of Petition
2. Petition
3. Affirmation in Support of Petition
4. Answer
5. Affidavit in Support of Answer
6. Memorandum of Law in Support of Answer

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE202
479-3011

March 6, 2002

Mr. Sidney Cooper
44 West 62nd Street
New York, NY 10023

Re: Roebling Liquors, Inc., et al.
v. Commissioner of Taxation and Finance, et al.
Application No. 01A681

Dear Mr. Cooper:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case had been presented to Justice Ginsburg, who on March 6, 2002, extended the time to and including May 19, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By -

Sandra Elliott Spagnolo
Assistant Clerk

NOTIFICATION LIST

Mr. Sidney Cooper
44 West 62nd Street
New York, NY 10023

Clerk
Court of Appeals of New York
20 Eagle Street
Albany, NY 12207